

## UNITED STATES DISTRICT COURT

## DISTRICT OF NEVADA

\* \* \*

UNITED STATES OF AMERICA,

Plaintiff,

vs.

MAYNARD MARTIN RICHARDS,

Defendants.

2:06-cr-00100-RCJ-RJJ

REPORT & RECOMMENDATION  
OF UNITED STATES  
MAGISTRATE JUDGE(Defendant's Motion to Dismiss  
Indictment (#38))

This matter came before the Court on Defendant's Motion to Dismiss Indictment (#38). The Court has considered the Defendant's Motion (#55), the Government's Opposition (#45), and the Defendant's Reply (#51).

**BACKGROUND**

On March 22, 2006, a federal grand jury returned an Indictment (#1) charging Defendant Maynard Martin Richards with one count of wire fraud and one count of deprivation of honest services, in violation of 18 U.S.C. §§ 1343, 1346, and 2.

The Indictment (#1) alleges that Richards "devised, planned, executed, and attempted to execute, a scheme and artifice to deprive and defraud the citizens of Nye County, Nevada, of the intangible right to the honest services of their elected public officials." This alleged scheme involved Richards, Candice Trummell, a duly elected Commissioner of Nye County and a government "cooperating witness." and others "known and unknown."

1           The State of Nevada and Nye County, authorize the operation of brothels or houses of  
2 prostitution within Nye County. Nye County is governed by the Nye County Commission  
3 (Commission), consisting of five elected public officials whose duties include regulating businesses  
4 in the county, including brothels, through the promulgation of ordinances and the issuance of  
5 business licenses. In Nye County, a “300 yard rule” exists that restricts the issuance of licenses and  
6 the operation of brothels if the business is “within three hundred yards of any public street, road or  
7 highway.” Nye County Ordinance 9.20.130 (2002).

8           It is alleged that Richards is engaged in the business of operating brothels in Nye County and  
9 has licenses to operate as many as three brothels. Further, the Indictment (#1) alleges that Richards  
10 owned land in Nye County located at the corner of Homestead Road and Silver Street, described as  
11 Lot 8, Block 24, Calvada Unit 14, Pahrump, Nevada (Calvada 14 Property). Richards, allegedly,  
12 planned on building and operating a brothel on the Calvada 14 Property but was prohibited due to  
13 the “300 yard rule.” To overcome this obstacle, it is alleged, that Richards “knowingly and  
14 intentionally devised, attempted to devise, executed, and attempted to execute, a fraudulent scheme  
15 to cause the County Commission to enact a revision to the Ordinance in such a way as to allow him  
16 to build a brothel on the Calvada 14 Property and to otherwise benefit his business interests.”

17           The purpose of the alleged scheme was to: “defraud and deprive the citizens of Nye County  
18 of the honest services of their public officials;” “to obtain money, property and business advantages  
19 the would enrich defendant Richards;” “to conceal the true nature, scope and purpose of the scheme  
20 through a planned pattern of deceit, deception, and dishonesty;” and “to conceal the true identities  
21 of any participants in the scheme and their relationships with defendant Richards, or the scheme,  
22 through a planned pattern of deceit, deception, and dishonesty.”

23           It is alleged that the scheme to defraud occurred in the following manner. Richards formed  
24 a scheme with known and unknown persons to meet with Nye County Commissioner Candice  
25 Trummell on several occasions to persuade her to use her influence and position of public trust to  
26 help Richards revise the “300 yard rule” by removing any restrictions that impeded him from  
27 building and operating a brothel on his Calvada 14 Property. If and when the new ordinance was  
28 revised, it would be advanced to the Commission for a vote, and Trummell would use her influence

1 to have the Commission vote in favor of the newly revised ordinance. In an attempt to corruptly  
2 influence Trummell to use her position of public trust, Richards paid Trummell on three separate  
3 occasions, consisting of: \$1,000 paid in cash; \$4,000 paid in the form of a check; and \$5,000 paid  
4 under the guise of a "Memorandum of Scholarship." All three of these payments were made for the  
5 purpose of "influencing . . . Trummell in a corrupt fashion and in order to induce and influence her  
6 to use her position of public trust and her public office to revise the ["300 yard rule"] . . . and to  
7 advance the revised and corrupted Ordinance to the full Commission for a vote."

8 Lastly, the Indictment (#1) alleges that Richards and "others known and unknown . . . aided  
9 and abetted by each other, did, for the purpose of executing the material scheme and artifice to  
10 defraud . . . knowingly transmit, and cause to be transmitted, by means of wire communication in  
11 interstate and foreign commerce, certain writing, signs, signals, or sounds." Count one alleges a  
12 communication by telephone on November 10, 2005, between Trummell, in Washington, D.C., and  
13 Richards in Nye County, Nevada. Count two alleges a communication on December 13, 2005, by  
14 Electronic Mail (email) containing the revised "300 yard rule" ordinance from an unidentified Nye  
15 County Commissioner to Trummell. The alleged email traveled by wired communication from Nye  
16 County, Nevada to Wendover, Utah, to Dulles, Virginia, and back to Nye County, Nevada.

17 Richards argues that the Indictment (#1) should be dismissed because: (I) it fails to inform  
18 Richards of the nature and cause of the accusations contained therein; (II) it fails to state a criminal  
19 offense by not stating a substantive or inchoate wire fraud violation under 18 U.S.C. §§ 1343, 1346,  
20 and 2; and (III) 18 U.S.C. §§ 1343, 1346, and 2 are unconstitutionally vague and over-broad as  
21 applied to this case.

## 22 DISCUSSION

### 23 **I. SUFFICIENCY OF THE INDICTMENT**

24 The Sixth Amendment provides, in pertinent part, that: "the accused shall . . . be informed  
25 of the nature and cause of the accusation." U.S. CONST. amend.VI. Federal Rule of Criminal  
26 Procedure 7(c)(1) provides that an "indictment . . . must be a plain concise, and definite written  
27 statement of the essential facts constituting the offense charged ." The indictment "should be read  
28 in its entirety, construed according to common sense, and interpreted to include facts which are

necessarily implied.” United States v. Givens, 767 F.2d 574, 584 (9th Cir. 1985) (citations omitted). The Supreme Court holds that an indictment “is sufficient if: (1) it contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend; and (2) it enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense.” Hamling v. United States, 418 U.S. 87, 117 (1974); see United States v. Hill, 279 F.3d 731, 741 (9th Cir. 2002). “Further, the test of sufficiency of the indictment is not whether it could have been framed in a more satisfactory manner, but whether it conforms to minimal constitutional standards.” United States v. Hinton, 222 F.3d 664, 672 (9th Cir. 2000).

### 1. 18 U.S.C. §§ 1343 and 1346

In the present matter, the Indictment (#1) alleges that Richards violated 18 U.S.C. §§ 1343 and 1346. Section 1343 provides, in pertinent part, that:

[w]hoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both.

18 U.S.C. § 1343. Moreover, the term “scheme or artifice to defraud” “includes a scheme or artifice to deprive another of the intangible right of honest services.” 18 U.S.C. § 1346. To be charged with wire and honest services fraud, an indictment must allege that: (1) a person devised or intended to devise a scheme or artifice to defraud by means of false or fraudulent pretenses, representations, or promises; (2) a person must transmit or cause the scheme to be transmitted by means of wire communication in interstate commerce; and (3) the transmission must be in form of any writing, sign, signal, picture, or sound for the purpose of executing the scheme or artifice. 18 U.S.C. § 1343.

The Indictment (#1) alleges that Richards and others intentionally “devised a scheme and artifice to deprive and defraud the citizens of Nye County.” The scheme consisted of Richards and others unlawfully influencing the Commission into enacting a revision to the “300 yard rule” which would allow Richards to build a brothel on his Calvada 14 Property; thereby, depriving the citizens of Nye County its right to honest services of its county commissioner. Since the test is not whether

1 the indictment must be framed in the most satisfactory manner, but must conform to the minimal  
2 constitutional standard, the Indictment (#1) fairly informs Richards that the Government is alleging  
3 that he and others devised or intended to devise and participate in a scheme or artifice to defraud the  
4 citizens of Nye County. The Indictment (#1) states that the scheme was devised by false pretenses,  
5 and that the false or fraudulent pretenses used by Richards and others included paying Trummell  
6 money to improperly influence her to depart from her faithful and impartial discharge of duties and  
7 functions as a County Commissioner. The Indictment (#1) fairly informs Richards the false or  
8 fraudulent pretenses that were allegedly used to advance the alleged scheme and artifice to defraud  
9 the citizens of Nye County.

10 The Indictment (#1) also states that the scheme was transmitted via wire through interstate  
11 commerce. The Indictment (#1) alleges that on November 10, 2005, and December 13, 2005,  
12 interstate wire communications occurred by sound and writing, allegedly furthering the scheme. The  
13 Indictment (#1) fairly informs Richards of when, where, and how the alleged scheme was transmitted  
14 by wire communication through interstate commerce.

15 The Court finds that the Indictment (#1) properly contains the elements for wire and honest  
16 services fraud under 18 U.S.C. §§ 1343 and 1346. Moreover, the Indictment (#1) is sufficient to  
17 allow Richards to plead an acquittal or conviction, under 18 U.S.C. §§ 1343 and 1346, and the  
18 Indictment (#1) ensures that Richards will not be placed in double jeopardy.

19 **2. 18 U.S.C. § 2**

20 An indictment alleging aiding and abetting, under 18 U.S.C. § 2, “must be accompanied by  
21 an indictment for a substantive offense.” Echavarria-Olarte v. Reno, 35 F.3d 395, 398 (9th Cir.  
22 1994) (citations omitted). Section 2 provides that: “[w]hoever commits an offense against the  
23 United States or aids, abets, counsels, commands, induces or procures its commission, is punishable  
24 as a principal[; and] [w]hoever willfully causes an act to be done which if directly performed by him  
25 or another would be an offense against the United States, is punishable as a principal.” 18 U.S.C.  
26 § 2. The Ninth Circuit holds that aiding and abetting liability contains four elements:

- 27  
28 (1) that the accused had the specific intent to facilitate the  
commission of a crime by another, (2) that the accused had the

1 requisite intent of the underlying substantive offense, (3) that the  
2 accused assisted or participated in the commission of the underlying  
substantive offense, and (4) that someone committed the underlying  
substantive offense.

3 United States v. Ching Tang Lo, 447 F.3d 1212, 1226 (9th Cir. 2006); see also United States v.  
4 Garcia, 400 F.3d 816, 819 n.2 (9th Cir. 2005). It is not required that the principal be named or  
5 identified in the indictment but only that somebody committed the offense and that the defendant  
6 intentionally did an act to help in its commission. United States v. Lynch, 437 F.3d 902, 915 (9th  
7 Cir. 2006) (en banc).

8 In the present matter, the substantive offense outlined in the Indictment (#1) is wire fraud and  
9 the deprivation of honest services. First, the Indictment (#1) alleges that Richards had specific intent  
10 to use Trummell, and other unknown individuals, in his scheme and artifice to deprive and defraud  
11 the citizens of Nye County. The Indictment (#1) informs Richards that he allegedly had the specific  
12 intent to facilitate the commission of the crime. Second, the Indictment (#1) alleges that Richards  
13 had the requisite intent to deprive the citizens of Nye County with honest services when he paid  
14 Trummell money to induce her to influence the Commission in passing the revised ordinance that  
15 would allow Richards to build a brothel on his Calvada 14 Property. Third, the Indictment (#1)  
16 alleges that Richards assisted and participated in the wire fraud and deprivation of honest services  
17 when he telephoned Trummell and when the alleged corrupted ordinance was transmitted via email  
18 across interstate commerce. Lastly, it was alleged in the Indictment (#1) that Richards committed  
19 the underlying substantive offense. See infra.

20 The Court finds that the Indictment (#1) properly contains the elements for aiding and  
21 abetting under 18 U.S.C. § 2. The Indictment (#1) is sufficient to allow Richards to plead an  
22 acquittal or conviction, under 18 U.S.C. § 2, and the Indictment (#1) ensures that Richards will not  
23 be placed in double jeopardy.

24 Richards argues that the Indictment (#1) fails to inform him of the nature and cause of the  
25 accusations based on 18 U.S.C. §§ 1343, 1346, and 2. The Court disagrees. The indictment must  
26 contain only the minimal constitutional standards which are that: “(1) it contains the elements of the  
27 offense charged and fairly informs a defendant of the charge against which he must defend; and (2)  
28

1 it enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense.”  
 2 Hamling, 418 U.S. at 117. The Court finds that the Indictment (#1) contains the minimal  
 3 constitutional standards and should not be dismissed for insufficiency.

## 4 **II. SUBSTANTIVE AND INCHOATE WIRE FRAUD VIOLATION**

5 United States Code, section 1343 “codifies a ‘direct’ theory of fraud in which the object of  
 6 the fraudulent scheme is to obtain money or other tangible property.” United States v. Williams,  
 7 441 F.3d 716, 720 (9th Cir. 2006). Prior to 1987, the Ninth Circuit criminalized schemes that  
 8 deprived others of tangible property rights and intangible rights. Id. at 721. Throughout “the history  
 9 of the federal mail and wire fraud statutes,” the “intangible rights” theory of fraud is and continues  
 10 to be controversial in the federal courts. Id. In 1987, the Supreme Court limited the scope of the  
 11 fraud statutes by stating that these statutes only “protect[] property rights . . . [and not] the  
 12 intangible right of the citizenry to good government.” McNally v. United States, 483 U.S. 350, 356  
 13 (1987). To overturn McNally’s precedent, Congress quickly enacted 18 U.S.C. § 1346 to include  
 14 “a scheme or artifice to deprive another of the intangible right of honest services.” Section 1346  
 15 codified an “intangible rights” theory of fraud where “the object of the fraudulent scheme is the  
 16 victim’s intangible right to receive honest services.” Williams, 441 F.3d at 720. Senator Biden,  
 17 while introducing § 1346 as part of the Anti-Corruption Act of 1988, stated:

18 Mr. President, I am pleased today to join with my colleagues in  
 19 introducing the Anti-Corruption Act of 1988. . . . This bill . . .  
 20 reverses the McNally case by creating a new public corruption statute  
 21 that will be used to bring charges against anyone who attempts to  
 22 deprive the citizens of the United States or of any State of the honest  
 23 services of a public official . . .

24 134 Cong. Rec. S12581-04 (daily ed. Sept. 16, 1988) (statement of Sen. Biden) (emphasis added).  
 25 Furthermore, the Ninth Circuit holds that the “intangible rights” theory of fraud, “as codified by  
 26 § 1346, can apply to private individuals as well as to public figures.” Williams, 441 F.3d at 723.

27 In the present matter, Richards argues that the Indictment (#1) should be dismissed because  
 28 it fails to state a criminal offense under 18 U.S.C. §§ 1343, 1346, and 2. Moreover, Richards argues  
 that the Indictment (#1) does not state: (1) a substantive wire fraud violation; or (2) an inchoate wire  
 fraud violation. The Court will now decide whether the indictment fails to state a criminal



substantive or inchoate wire fraud violation.

### **1. Substantive Wire Fraud Violation**

Richards argues that the Indictment (#1) does not state a substantive wire fraud violation, because the allegations of the Indictment (#1) do not provide: (a) that a fiduciary or trust relationship existed between Richards and either the Nye County Commission or its constituency; (b) that Richards violated any state law; (c) that Richards privately gained from the alleged fraud; and (d) that any breach of fiduciary obligation or malfeasance in the exercise of the official duties or discretionary functions of a county commissioner occurred.

#### **(a) Fiduciary or Trust Relationship**

Richards argues that, as a matter of law, he cannot be found guilty of a deprivation of honest services fraud, pursuant to 18 U.S.C. §§ 1343, 1346, and 2, because no fiduciary or trust relationship existed between himself and either the Nye County Commission or its constituency. Moreover, Richards argues that because Trummell was a “government agent,” conspiracy to commit honest services mail fraud could not attach because there can be no indictable conspiracy with a government agent who secretly intends to frustrate the conspiracy. The Court now determines whether the intangible right of honest services applies to Richards.

Richards points to Williams to argue that a person may not be convicted for the deprivation of honest services if no fiduciary or trust relationship exists between the accused and the defrauded. In Williams, the Ninth Circuit found that the deprivation of honest services may apply to private individuals as well as public figures. 441 F.3d at 723. However, the Ninth Circuit did not answer the issue of “whether the ‘intangible right of honest services’ in § 1346 applies to persons who are not fiduciaries.” Id. In Williams, the defendant, hired as a financial advisor and estate planner, used his fiduciary position to convert large sums of money, entrusted to him from his clients, for his own personal use. Id. at 724. Since a fiduciary relationship existed, the Ninth Circuit remained silent on this issue. The Court now determines whether the deprivation of honest services applies to Richards in this specific case.

The parties were unable to identify a Ninth Circuit case on this issue. However, United States v. Potter, a case from the First Circuit, gives the Court guidance. 463 F.3d 9 (1st Cir. 2006).



1 In Potter, the First Circuit upheld the convictions of two individuals for conspiring to deprive the  
2 public of a public official's honest services in violation of 18 U.S.C. § 1346. Id. Defendant Potter  
3 was the chief executive officer and Defendant Bucci was a general manager for the company LPRI,  
4 LLC (Lincoln Park). Id. at 13. Lincoln Park ran gambling facilities in Lincoln, Rhode Island. Both  
5 Potter and Bucci were charged with forming a scheme to bribe the then-speaker of the Rhode  
6 Island House of Representatives, John Harwood. Id. Lincoln Park retained Daniel McKinn,  
7 Representative Harwood's law partner of the firm of McKinnon & Harwood, for zoning and other  
8 matters. Id. The scheme consisted of paying McKinnon's law firm large sums of money with the  
9 purpose of paying Representative Harwood to shape legislation that would benefit Lincoln Park. Id.

10  
11 Potter is analogous to the case at hand because neither Potter nor Bucci owed a fiduciary duty  
12 to the public, and neither Potter nor Bucci conspired with Representative Harwood or his law partner  
13 McKinnon in forming or executing the scheme. Potter and Bucci sent several faxes to each other  
14 "arguing about the details of the plan and making quite clear that the payments contemplated were  
15 intended to advance Lincoln Park's legislative agenda." 463 F.3d at 14-15. In attacking the  
16 indictment, Potter and Bucci stated that no evidence existed showing that Harwood was a party to  
17 the agreement or even knew of the scheme. Id. at 16. The First Circuit found that a public official  
18 need not be part of a scheme to deprive the public of an elected official's honest services for criminal  
19 liability to apply, and neither the language or the policy of 18 U.S.C. § 1346 mandate this  
20 requirement. Id. The First Circuit explained that just as Representative Harwood "could not be  
21 convicted without proof of his knowing participation . . . under the statute anyone could concoct a  
22 scheme to deprive . . . citizen's of Harwood's honest services and could send [a communication by  
23 wire] for the purpose of executing such a scheme." Id. at 16-17. Moreover, the First Circuit stated:

24  
25 Similarly, two persons could conspire to devise the scheme and to use  
26 [wired communications] for purposes of executing the scheme. That  
27 Harwood might prove unwilling or unable to perform, or that the  
28 scheme never achieved its intended end, would not preclude  
conviction for either the substantive offense (sending the [wired  
communication]) or forming the conspiracy.

Id. at 17. The Court adopts Potter's reasoning and holding.

1 In the present matter, Richards allegedly conspired with “others known and unknown” to  
 2 execute the material scheme and artifice to defraud. It is of no importance whether Richards could  
 3 or even conspired with Trummell because the Indictment (#1) alleged a conspiracy with other  
 4 individuals. In addition, the Indictment (#1) alleges that wire communications through interstate  
 5 commerce were used in furtherance of the scheme. Although Trummell may have proved unwilling  
 6 or unable to perform, it does not preclude Richards from being charged in the Indictment (#1)  
 7 because it is alleged that Richards and others participated in the scheme. It is the participation in a  
 8 scheme or artifice to defraud that 18 U.S.C. §§ 1343, 1346, and 2 criminalizes. Here, the  
 9 Indictment (#1) clearly stated the requisite elements to put Richards on notice. The Court finds, as  
 10 applied in this case, a fiduciary relationship need not exist for Richards to be charged under 18  
 11 U.S.C. §§ 1343, 1346, and 2.

12 **(b) State Law Violation**

13 Richards argues that in order to be convicted of honest services fraud pursuant to 18 U.S.C.  
 14 §§ 1343 and 1346, Trummell’s and his actions must violate a Nevada state law, and since the  
 15 indictment did not allege any violations of Nevada state law, no violation for honest services fraud  
 16 may exist. In Nevada, state law criminalizes the conduct of any person, including a public official  
 17 or employee, for bribing or being bribed. See Nev. Rev. Stat. §§ 281.350 and 197.020. Nevada  
 18 Revised Statute § 281.350 provides that:

19 Every public officer or public employee who shall ask or receive,  
 20 directly or indirectly, any compensation, gratuity or reward, or any  
 21 promise thereof, upon any agreement or understanding that he shall  
 22 act in any particular manner in connection with his official duties or  
 23 the public service; or who, being authorized to purchase or contract  
 24 for materials, supplies or other articles or to employ servants or labor  
 25 for the state or any county or municipality, or for the public service,  
 shall ask or receive, directly or indirectly, for himself or another, a  
 commission, percentage, discount, bonus or promise thereof from any  
 person with whom he may deal in relation to such matters, shall be  
 guilty of a gross misdemeanor.

26 Nevada Revised Statute § 197.020 provides that:

27 A person who gives, offers or promises, directly or indirectly, any  
 28 compensation, gratuity or reward to a person executing any of the  
 functions of a public officer other than as specified in NRS 197.010;  
 199.010; and 218.590, with the intent to influence him with respect

to any act, decision, vote or other proceeding in the exercise of his powers or functions, is guilty of a category C felony and shall be punished as provided in NRS 193.130.

Richards proposes that in order to be convicted of honest services fraud, the Indictment (#1) must allege that either his or Trummell's actions violated Nevada Revised Statutes §§ 281.350 and 197.020. The Court disagrees. "State law is irrelevant in determining whether a certain course of conduct is violative of the wire fraud statute." United States v. Malone, 2006 WL 2583293, at \*3 (D. Nev. 2006) (quoting United States v. Louderman, 576 F.2d 1383, 1387 (9th Cir. 1978)). The court in Malone found Louderman, a pre-McNally case, persuasive to show that prior to the enactment of 18 U.S.C. § 1346, the law established that it was unnecessary for an indictment to include state law violations in order to charge a person with honest services fraud. Malone, 2006 WL 2583293, at \*3. The Court agrees with Malone's holding. After reading 18 U.S.C. §§ 1343 and 1346, the Court is not persuaded to adopt Richard's position. The Court's reading of 18 U.S.C. §§ 1343 and 1346 makes it clear that state law violations need not be alleged in the indictment for Richards to be charged with honest services fraud. Richard's argument would add an unnecessary element to charge a person with honest services fraud.

Lastly, Richards argues that alleging a state law violation in the indictment acts as an important "limiting principle" so that innocent people are not charged with honest services fraud. The Court disagrees. The "limiting principles" in 18 U.S.C. §§ 1343 and 1346 are the intent to defraud and the participation in the scheme. A person who has not intentionally participated in a scheme cannot be charged for honest services fraud. State law violations are not relevant in determining whether a person intentionally participated in a scheme to defraud. Therefore, the Court holds that a person may be charged for honest services fraud pursuant to 18 U.S.C. § 1346, even though no state law violation was alleged in the Indictment (#1).

#### **(c)Actual Gain Received**

The Court is also persuaded by Malone that "personal gain is not an element of honest services wire fraud." Malone, 2006 WL 2583293 at \*3. The Malone decision stated that the "intent to defraud" element serves "as a limiting principal to ensure that not every breach of a fiduciary duty [is] punishable as honest services fraud." 2006 WL 2583293 at \*4. It is this requirement of specific

1 intent that “prevents every potential ‘scheme or artifice to defraud’ from becoming a federal crime.”  
2 Id. Here, the Indictment (#1) alleges that Richards intended to devise, plan, execute, and attempted  
3 to execute, “a scheme and artifice to deprive and defraud the citizens of Nye County, Nevada, of the  
4 intangible right to the honest services of their elected public officials.” The requisite “specific  
5 intent” element for honest services fraud is was outlined in the indictment; therefore, a “limiting  
6 principle” was satisfied to charge Richards with wire and honest services fraud. The Court finds that  
7 actual gain is not a requisite element for wire and honest services fraud. Therefore, the Indictment  
8 (#1) does not fail on its face.

#### 9 **(d) Trummell’s Actions**

10 Lastly, Richards argues that the Indictment (#1) does not state a substantive wire fraud  
11 violation because Trummell did not misuse her position while sitting as an active county  
12 commissioner. Richards argues that Trummell was hired by Richards as a freelance legal assistant  
13 and political consultant. Moreover, Trummell’s duties while employed with Richards had nothing  
14 to do with the exercise of her official duties or the discretionary functions of her public office. The  
15 Government argues that it should be up to the trier of fact to answer the question of whether  
16 Trummell acted in her private capacity. The Court agrees. Whether Trummell acted as a private  
17 consultant or within her capacity as a public officer, is an issue better left for the jury to decide.  
18 Because allegations stated in the indictment must be assumed to be true, the Court must assume that  
19 Richards allegedly intended to defraud the citizens of Nye County of the honest services of their  
20 public official when Richards and others allegedly devised, planned, and executed the scheme.  
21 United States v. Bohonus, 628 F.2d 1167 (9th Cir. 1980).

22 The Court concludes that the Indictment (#1) states a substantive wire fraud violation and  
23 does not fail on its face. Honest services wire fraud consists of a scheme or artifice to defraud, the  
24 intent to defraud, and the transmission of wired communications in interstate commerce to carry out  
25 or to attempt to carry out the scheme or plan. 18 U.S.C. §§ 1343 and 1346. The Indictment (#1)  
26 states these requisite elements for the substantive wire fraud violation.

#### 27 **2. Inchoate Wire Fraud Violation**

28 Richards argues that the Indictment (#1) does not state an inchoate wire fraud violation,

1 because: (a) liability for aiding and abetting under 18 U.S.C. § 2, is conditioned on the commission  
 2 of a substantive criminal offense by someone; and (b) Trummell committed no substantive criminal  
 3 offense.

4 **(a) Aiding and Abetting Liability**

5 The Ninth Circuit states that “aiding and abetting is embedded in every federal indictment  
 6 for a substantive crime.” United States v. Garcia, 400 F.3d 816, 820 (9th Cir. 2005). For aiding and  
 7 abetting liability to apply, the government must prove four elements:

8 (1) that the accused had the specific intent to facilitate the  
 9 commission of a crime by another[;] (2) that the accused had the  
 10 requisite intent of the underlying substantive offense[;] (3) that the  
 11 accused assisted or participated in the commission of the underlying  
 substantive offense[;] and (4) that someone committed the underlying  
 substantive offense.

12 Id. at 819 n.2. Richards argues that aiding and abetting liability cannot apply because no one  
 13 committed the underlying substantive offense.

14 The underlying substantive offense is forming a fraudulent scheme to deprive another of the  
 15 intangible right of honest services; and the interstate transmission of the scheme by wire. The  
 16 Indictment (#1) charges Richards with fraud by wire and deprivation of honest services. As  
 17 discussed supra, for a person to be convicted of wire fraud and honest services fraud the person must  
 18 first devise or intend to devise a scheme or artifice to defraud. The Indictment (#1) alleges that  
 19 Richards formed the scheme with known and unknown persons. It is not necessary for an indictment  
 20 to state all those involved in the scheme or artifice to defraud. Feldstein v. United States, 429 F.2d  
 21 1092, 1095 (9th Cir. 1970). Second, the Indictment (#1) alleges that Richards acted with intent to  
 22 deprive the citizens of Nye County of its right to the honest services of its county commissioner.  
 23 Lastly, the Indictment alleges that the underlying substantive offense occurred when a telephone call  
 24 was made on November 10, 2005, between Trummell, in Washington, D.C., and Richards in Nye  
 25 County, Nevada, and when an email communication was transmitted in furtherance of the “scheme”  
 26 on December 13, 2005. The Indictment (#1), although it does not state all the individuals who  
 27 allegedly participated in the honest services fraud scheme, does state that a wire and honest services  
 28 fraud violation occurred. The Court finds that the Indictment (#1) states a sufficient inchoate wire

1 fraud violation.

2 **(b) No Substantive Criminal Offense**

3 Richards next argues that because Trummell did not commit a substantive criminal offense,  
 4 he cannot be charged with honest services fraud or fraud by wire. Richards points to United States  
 5 v. Lo, to argue that “the agreement in a conspiracy cannot be established with evidence that the  
 6 defendant had an agreement with a government informer.” 447 F.3d at 1225. It is alleged that  
 7 Trummell acted as a “cooperating witness” or government agent and, therefore, could not and did  
 8 not commit a substantive criminal offense. This is true. However, the Indictment (#1) does not  
 9 allege that Richards conspired with Trummell. It alleges that he and others, whose object was to  
 10 conceal their true identities, conspired and participated in the scheme. Further, the Indictment (#1)  
 11 alleges that Richards participated in the underlying substantive offense.

12 Trummell’s actions are inconsequential because it is the participation in a scheme to deprive  
 13 the citizens of Nye County of their honest services and the communication of the scheme by wire  
 14 through interstate commerce that is at issue. Two individuals may conspire together. The Indictment  
 15 (#1) alleges Richards and others known and unknown conspired, and with that purpose one or both  
 16 could communicate with others using wire communications in furtherance of the scheme. The  
 17 argument that Trummell was a government agent, or that she was unable perform, or even that the  
 18 scheme never achieved its intended purpose, does not preclude a conviction for either the substantive  
 19 offense (making the telephone call and transmission of the email) or forming the conspiracy. Potter,  
 20 463 F.3d at 17.

21 The Court finds that the Indictment (#1) does not fail to state an inchoate wire fraud violation  
 22 because it is alleged that a substantive criminal offense was committed and because Trummell’s  
 23 actions are inconsequential to Richards’ charges.

24 **III. UNCONSTITUTIONALITY OF 18 U.S.C. §§ 1343, 1346, AND 2**

25 Richards argues that 18 U.S.C. §§ 1343, 1346, and 2, are unconstitutionally vague and  
 26 overbroad. A party may challenge a statute for vagueness either by arguing that the statute is vague  
 27 on its face or vague as applied in the case. When examining a statute for vagueness, it must be  
 28 determined “whether a person of average intelligence would reasonably understand that the charged

1 conduct is prescribed . . . [and] [t]he statute must be examined in the light of the facts of the case at  
2 hand.” Williams, 441 F.3d at 724 (quotations omitted). Here, Richards challenges 18 U.S.C. §§  
3 1343, 1346, and 2, as unconstitutionally vague and overbroad as applied in his case.

4 The Court now examines 18 U.S.C. §§ 1343, 1346, and 2 “in the light of the facts of the case  
5 at hand.” Williams, 441 F.3d at 724. Richards argues that 18 U.S.C. §§ 1343, 1346, and 2 are  
6 unconstitutionally vague as applied to his case because no person of average intelligence would  
7 reasonably understand that a private citizen who owes no fiduciary duty to the citizens of Nye  
8 County could be convicted of mail and honest services fraud when no state law violation was alleged  
9 in the Indictment (#1), and where the public official was actually a government informer. Moreover,  
10 Richards argues that charging him with honest services fraud amounts to a radical departure from  
11 the pre-existing case law. The Court disagrees.

12 The wire and honest service fraud statutes, prior to McNally and after the enactment of 18  
13 U.S.C. § 1346, criminalized behavior where a scheme was formed with the intent to defraud another  
14 of the intangible right of honest services, where a person participated in the scheme, and where the  
15 scheme was furthered by the use of interstate commerce. A simple reading of 18 U.S.C. §§ 1343,  
16 1346, and 2 indicates that any person with the intent to defraud, who forms a scheme to deprive  
17 another of the intangible right of honest services and in furtherance of the scheme uses interstate  
18 commerce, may be charged with wire and honest services fraud. Richards argument that the statute  
19 is vague and overbroad is without merit. A person of average intelligence understands that forming  
20 and furthering a scheme with others to defraud the citizens of Nye County of their public officials’  
21 honest services by the use of interstate commerce amounts to a crime. Therefore, 18 U.S.C. §§ 1343,  
22 1346, and 2 are not unconstitutionally vague and overbroad as applied in this case.

23 “A law is overbroad if it prohibits not only acts the legislature may forbid, but also  
24 constitutionally protected conduct.” Schwartzmiller v. Gardner, 752 F.2d 1341, 1346 (9th Cir.  
25 1984). For Richards to prevail with his argument that 18 U.S.C. §§ 1343, 1346, and 2 is overbroad,  
26 he must show that his conduct was constitutionally protected. Richards argues that these statutes are  
27 overbroad because it charges him, a private citizen, who owes no fiduciary duty to citizens of Nye  
28 County, with honest services fraud. As discussed supra, even though Richards is a private citizen,



1 Trummell was a cooperating witness, and no state law violations were indicated in the Indictment  
2 (#1), Richards may still be charged with honest services fraud. It was Congress' intent to criminalize  
3 anyone intentionally depriving a citizen of the honest services of their public officials through  
4 bribery. 134 Cong. Rec. S12581-04 (daily ed. Sept. 16, 1988) (statement of Sen. Biden). The Court  
5 finds that 18 U.S.C. §§ 1343, 1346, and 2 are not overbroad as applied to this case, because these  
6 statutes do not criminalize constitutional behavior.

7 The Court concludes that 18 U.S.C. §§ 1343, 1346, and 2 are not unconstitutionally vague  
8 or overbroad as applied in this case because a person of average intelligence would reasonably  
9 understand that these statutes criminalize the alleged behavior Richards engaged in, and the alleged  
10 behavior was not constitutionally protected.

### 11 CONCLUSION

12 The Court finds that the Indictment (#1) sufficiently informs Richards of the charge  
13 against him, and it enables him to plead an acquittal or conviction in bar of future prosecutions  
14 for the same offense. Furthermore, the Court finds that the Indictment (#1) did not fail to state a  
15 substantive or inchoate wire and honest services fraud criminal offense under 18 U.S.C. §§ 1343,  
16 1346, and 2. Lastly, the Court does not find 18 U.S.C. §§ 1343, 1346, and 2 to be  
17 unconstitutionally vague or overbroad as applied to this case.

### 18 RECOMMENDATION

19 Based on the foregoing and good cause appearing therefore,

20 IT IS THE RECOMMENDATION of the undersigned Magistrate Judge that the  
21 Defendant's Motion to Dismiss Indictment (#38) be **DENIED**.


### 23 NOTICE

24 Pursuant to Local Rule IB 3-2 any objection to this Report and Recommendation  
25 must be in writing and filed with the Clerk of the Court on or before February 11, 2009.

26 The Supreme Court has held that the courts of appeal may determine that an appeal has been  
27 waived due to the failure to file objections within the specified time. Thomas v. Arn, 474 U.S.  
28 140, 142 (1985). This circuit has also held that (1) failure to file objections within the specified

1 time and (2) failure to properly address and brief the objectionable issues waives the right to  
2 appeal the District Court's order and/or appeal factual issues from the order of the District Court.  
3 Martinez v. Ylst, 951 F.2d 1153, 1157 (9th Cir. 1991); Britt v. Simi Valley United Sch. Dist.,  
4 708 F.2d 452, 454 (9th Cir. 1983).

5 DATED this 26<sup>th</sup> day of January, 2009.

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9 ROBERT J. JOHNSTON  
United States Magistrate Judge  
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